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1970
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No. 1473

In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1969

MONOGRAM MODELS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, A.D. 1969

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MONOGRAM MODELS, INC.,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Monogram Models, Inc., Petitioner, prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Seventh Circuit, entered in this cause on December 9, 1969, granting enforcement of an Order issued against Petitioner by the National Labor Relations Board.

OPINION BELOW

The opinion of the Court of Appeals appears herein as Appendix A, at pp. App. 1-4.

JURISDICTION

The Decision of the Court of Appeals was rendered on December 9, 1969. The Court's Judgment was entered on March 16, 1970 and petition for rehearing was denied on February 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 10(e) of the National Labor Relations Act, as Amended, 29 U.S.C. § 160(e).

QUESTION PRESENTED

Whether a National Labor Relations Board Order predicated on a finding that Petitioner unlawfully threatened non-employee union organizers with arrest and prosecution for criminal trespass while they stood on the shoulder of the public highway in front of Petitioner's plant should be enforced where the Order is clearly erroneous because the record shows that the trespassers were not on the highway shoulder at the time, but in fact were on Petitioner's private property used entirely and exclusively for Petitioner's private purposes?

STATUTES INVOLVED

The National Labor Relations Act, as Amended (61 Stat. 156), insofar as here pertinent, provides:

> Section 10 (e):
> "• • • The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. • • • Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by

the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of Title 28."

STATEMENT

On March 21, 1968,[1] Respondent issued an Order against Petitioner, based upon its finding that Petitioner violated Section 8(a)(1) of the National Labor Relations Act ("Act").

The essential facts are as follows:

1. The western boundary of Petitioner's property is the center line of Waukegan Road, a public highway.

2. The westerly fifty (50) feet of Petitioner's property is subject to an easement for purposes of a public highway —but *only* the thirty (30) feet immediately east of the center line are used for easement purposes. Of the thirty (30) feet, as measured from the center line of Waukegan Road, twenty (20) feet are utilized by the paved portion of the north-bound two (2) lanes of the highway and the remaining approximately ten (10) feet immediately to the east of the paved portion is used as the highway shoulder that serves the east side of the highway. The balance of the area that is subject to the easement has never been used for highway or highway shoulder purposes. It is utilized only as a part of Petitioner's private property for purposes of Petitioner's private driveway and private parking area.

3. The area of Petitioner's property located to the east of the thirty (30) feet utilized for the paved highway and unimproved shoulder is enclosed by a fence on the north, south and east boundary lines and is posted with

[1] 170 N.L.R.B. 184

signs noting that Petitioner's property is private and "no trespassing" is permitted. It is within this clearly private property that the non-employee organizers were present when Petitioner asked them to leave and advised them if they refused to do so, they would be arrested as trespassers.

The Court has clearly failed to recognize the obvious lack of the application of its Decision to the facts in this case.

Basic truth requires that the Board and the Court of Appeals should have declared that the non-employee organizers were trespassers on a part of Petitioner's private property not used for purposes of the public highway or highway shoulder and accordingly, were not engaged in protected activity and thus, Petitioner did not violate Section 8(a)(1) of the Act.

In order to logically have premised the conclusion reached by the Board and enforced by the Court of Appeals, it was incumbent upon the Board to have found that Petitioner's exclusively private property could be utilized by the non-employee union organizers because there were no other reasonable channels of communication available to them in trying to communicate with Petitioner's employees.[2] Since such a finding could not and in fact was not made, it follows that the Board's Decision is erroneous and should have been so held by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision does not settle the question of the rights of non-employee organizers to enter

[2] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

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Petitioner's private property not used for the public highway or highway shoulder.

2. Enforcement of an erroneous order of the Board would unfairly penalize Petitioner and is tantamount to a deprivation of Petitioner's private property without due process of law.

3. Fundamental justice demands that Petitioner not be deemed guilty of a violation of the law that Petitioner has not committed.

4. The proper administration of the Labor Management Relations Act of 1947, as Amended, requires that the decisions of the National Labor Relations Board have a fundamental integrity and where the Board refuses to establish the location of the act found violative of the law, its decision cannot properly be enforced.

5. The act of Petitioner found in violation of the law occurred on exclusively private property and such determination is erroneous and contrary to law.

ERROR IN DECISION OF COURT OF APPEALS

Despite these seemingly clear and uncontradicted facts, the Trial Examiner and the Board ignored them and sought by means of a loose reference to the area impressed with an easement to treat the entire area as currently utilized for easement purposes. After the Trial Examiner caused this error, the Board was repeatedly urged to make the required correction and to locate the trespasses, but for a totally not understandable reason, refused to do so.[3]

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[3] Motion for Reconsideration of Board's Decision and Order, filed April 20, 1968. Motion for Clarification of Board's Finding and Conclusion and to Reopen Hearing, filed May 25, 1968.

The Court of Appeals was also repeatedly directed to these important and controlling facts, but failed to correct them.[4] In enforcing the Board's Order, the Court of Appeals held that the "highway shoulder can be used for the exercise of First Amendment Rights"—a holding with which Petitioner completely concurs.

The Court of Appeals arbitrarily failed to determine and establish the location of Petitioner's conduct found violative of the Act. By inference only, it must be taken that the Court of Appeals regarded the trespasses and the acts of the Petitioner as having occurred on the highway shoulder. There is no dispute with the Court's holding that non-employee organizers have First Amendment rights on the highway shoulder. Ironically, the Order entered by the Board and enforced by the Court of Appeals is contrary to law and to the Court's Decision. The Court properly concluded, as a matter of law, that non-employee union organizers may, in the exercise of their First Amendment Rights, use the highway shoulder for organizational purposes and completely ignored the relevant and controlling fact that the Petitioner's attempt to arrest the trespassers did not occur on the highway shoulder. The uncontroverted record evidence established that the organizers were not on the highway or highway shoulder when threatened with prosecution for trespass, but actually on Petitioner's exclusively private property, at a point considerably east of the highway shoulder.[5]

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[4] Petitioner's Brief and Petition for Rehearing, filed in Court of Appeals.

[5] App. pp. 5-8

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM AND SESSION — 1969

No. 17536
NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
MONOGRAM MODELS, INC., *Respondent*.

On Petition for Enforcement of an Order of the National Labor Relations Board.

DECEMBER 9, 1969

Before KNOCH, *Senior Circuit Judge*; FAIRCHILD, *Circuit Judge*; and GRANT, *District Judge*.*

GRANT, *District Judge*. This is a petition by the Labor Board, pursuant to Section 10 (e) of the Labor Management Relations Act, 61 Stat. 146 (1947), 29 U.S.C. § 160 (e), for enforcement of an Order issued against Respondent, Monogram, on March 21st, 1968.[1] The Board found that Monogram violated Section 8 (a) (1) of the Act. We agree.

* District Judge from the United States District Court for the Northern District of Indiana, sitting by designation.

[1] The Board's Decision and Order are reported at 170 NLRB No. 84.

Monogram, which manufactures model hobby products, is located in Morton Grove, Illinois, adjacent to State Highway No. 43 (commonly known as Waukegan Road) just north of its intersection with Caldwell Avenue. Monogram's property fronts to the west on Waukegan Road, a four-lane highway with a posted speed limit of 45 M.P.H. The lot is rectangular in shape and bounded on the south and east by a forest preserve. To the north is located an Illinois Bell Telephone facility. Respondent's premises are fenced in on all sides except the west where there are two exits from, and one entrance to, the plant off of State Highway No. 43.

Respondent's property, on this west side, extends to the center line of Waukegan Road, but the western fifty feet thereof are impressed with a permanent public highway easement. Proceeding east from the center line of Waukegan Road, the paved highway extends thirty feet. An unimproved and irregular shoulder extends along the edge of the paved way for several yards. Pedestrians traveling north and south on the east side of Waukegan Road walk on this shoulder which is bounded, on its east side, by concrete parking blocks, Monogram's paved parking lot for employee use, and a building used for manufacturing, respectively.

Located at the southwest corner of the property are two traffic signals to control traffic entering and exiting from Monogram's plant. These signals are located within the fifty-foot highway easement. In January, February, and April, of 1967, agents of the Union, District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, stood on the shoulder, adjacent to these stoplights, and attempted to distribute Union literature to respondent's employees. Respondent threatened the non-employee Union organizers with arrest and prosecution for criminal trespass and secured local police assistance in removing them from the permises.

The Union then filed a complaint charging Monogram with a Section 8 (a) (1) violation. On November 30, 1967,

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the Trial Examiner issued his decision, finding that Monogram interfered with the distribution of Union literature by non-employee organizers in violation of Section 8 (a) (1) of the Act. The Board, on March 21, 1968, adopted the Trial Examiner's findings, conclusions, and recommended order, with some modification.

Monogram's position from the outset, has been that the Union organizers were on its private porperty and had other reasonable means of access to the employees and, therefore, that it was justified in threatening the organizers with prosecution for trespass and causing the police to remove them from the property.[2]

Admittedly, the Union agents were on Monogram's property. They were, however, using an area impressed with an easement for purposes of a public highway. Respondent contends that the easement was limited to travel by vehicular traffic and that to allow the Union to handbill employees from the shoulder adjacent to the traffic signals, places an additional servitude on its property. Additionally, Monogram argues that the shoulder area has never been used for easement purposes so that it remains private property as though no easement had ever been taken.

Respondent reads the scope of the easement too narrowly. It was taken for purposes of a public highway which include, among other incidental uses, pedestrian passage. See *In re Opinion of the Justices,* 297 Mass. 559, 8 N.E.2d 179 (1937). *Cf., Chicago Motor Coach Co.*

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[2] *See N.L.R.B.* v. *Babcox & Wilcox Co.,* 351 U.S. 105 (1956). The Trial Examiner found, not only that the organizers were not on Monogram's private property but, alternatively, even if they were, the Union did not have other reasonable access to the employees. This latter alternate finding is not before us because the Board declined to rule on it. Its order was grounded solely on the theory that the attempted handbilling took place on a public, or quasi-public, site, and thus interference therewith was unlawful.

v. *Chicago*, 337 Ill. 200, 169 N.E. 22 (1929); *Muller* v. *Hillenbrand*, 227 N.Y. 448 125 N.E. 808 (1920); *Indiana Springs Co.* v. *Brown* 165 Ind. 465 74 N.E. 615 (1905). And in view of the stipulation entered into by General Counsel and Monogram that "[p]edestrians going north and south on the east side of Waukegan Road walk on the shoulder" the latter cannot now argue that the shoulder was never used for easement purposes, *i.e.*, pedestrian travel.

In our view, the shoulder area here in dispute is legally indistinguishable from a sidewalk. The only difference is that a sidewalk is an improved concrete way for pedestrian travel. This shoulder is thus an unimproved sidewalk or walkway — call it what you will. Access to such a public way is associated with First Amendment rights. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (7th Cir. 1953). Handbilling is within the protection of the First Amendment. *Logan Valley, supra.* The record is devoid of any facts which even hint that the Union agents were disorderly or otherwise removed themselves from the First Amendment's protective pale. Respondent could not, then, without committing a Section 8 (a) (1) violation, threaten the non-employee organizers with criminal trespass prosecution, since their use of the property was lawful and protected. *Logan Valley, supra. Marshall Field & Co., supra.*

The Board's order will be enforced in full.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 17536

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MONOGRAM MODELS, INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

PETITION OF MONOGRAM MODELS, INC. FOR REHEARING

Monogram Models, Inc., Respondent, respectfully petitions the Court to grant a rehearing to reconsider the Court's Decision issued on December 9, 1969, enforcing the Board's Order in full, because the decision is premised on the erroneous determination that the non-employee union organizers were on the shoulder of the public highway at the times Respondent threatened their arrest for trespassing.

As will be demonstrated, the organizers were not on the shoulder of the public highway at the times in question but were on a portion of Respondent's private property not used for the public highway or its shoulder.

At the outset Respondent acknowledges that it accepts and is in agreement with that portion of the Court's decision holding that the organizers have First Amendment rights while on the highway shoulder. However, Respondent desires to make abundantly clear that on each occasion of the claimed trespasses the organizers were not on the highway shoulder and therefore Respondent's conduct did not violate the Act.

The record evidence established the location of the organizers at the times Respondent claimed they were trespassing as: (1) at the traffic light located at the entrance to the parking lot and (2) the area directly south of that light. General Counsel's witness Butkus fixed the points at which he and the other organizers were standing as the traffic light at the entrance to the parking lot and the area to the south of that point. The traffic light in question is located approximately forty one and one-half (41½) feet east of the center line of Waukegan Road. Only the thirty (30) feet east of the center line is used for the highway *and* shoulder. Of the thirty (30) feet, twenty (20) feet immediately east of the center line is paved.[1] The remaining approximately ten (10) feet east of the paved portion is used for the highway shoulder. The organizers were approximately eleven and one-half feet east of the highway shoulder at the times they were threatened with arrest and trespassing.

At pages 25, 27, 28, 29 and 30 of the Appendix the testimony of General Counsel's witness Joseph Butkus fixed the location of the organizers as:

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[1] At page 2, in Paragraph 2 of the December 9, 1969 Decision, the Court incorrectly stated that the paved highway extends thirty (30) feet.

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1. "The only place we stationed anybody . . . was the entrance to the parking lot . . ." (A 25)

2. "There was no reason to place anybody . . . other than [at] the driveway into the parking lot". (A 25)

3. We were "right at the entrance to the parking lot where the traffic light stands". (A 27)

4. The traffic light to which he referred is "on the north side of the south entrance, being the one closest to the road serving that entrance." (A 27)

5. "The entrance to the parking lot was the only place we were and we were right at that traffic light". (A 27)

6. This witness also identified the traffic signal as the one on the north side of the south entrance and more specifically that the organizers were on both sides of this traffic light. (A 28)

7. The traffic light at which Butkus and the other organizers were standing is again described as the one "most southerly and located on the north side of the south entrance". (A 29)

An examination of Respondent's Exhibits 2(e), 2(f), 2(g) and 2(h) also fully reveals that the traffic light and adjacent area at which the organizers were standing is not on the highway shoulder, but at a point eleven and one-half (11½) feet east of the highway shoulder.

It was incumbent upon the Board to establish the location of the organizers at the times they were threatened with arrest for trespass. The testimony of witness Butkus fixed their location as the private property of Respondent and not on the highway shoulder. The Trial Examiner erroneously found that the organizers were on the shoulder of the public highway. The Board failed to evaluate the record testimony and erroneously adopted his finding.

The Butkus testimony must govern the determination of this critical fact. It would be a miscarriage of justice to base the decision in this case on a belief that the organizers were on the shoulder when the fact—as unequivocally established by the record evidence—is clearly to the contrary.

Respondent respectfully requests the Court to correct its Decision to the extent that the Board's order be denied enforcement on the ground that the organizers were not on the highway shoulder. Should the Court be unable to conclude from the present state of the record that the organizers were not on the highway shoulder, it is respectfully submitted that this case be remanded to the Board for further hearing to establish the precise location of the organizers.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that the Petition for Rehearing be granted and upon such Rehearing the Court find that the organizers were not on the shoulder of the public highway and, further, that the Order of the Board for enforcement be denied.

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December 30, 1969

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OCTOBER TERM, A.D. 1969

MONOGRAM MODELS, INC.,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA

Before The

NATIONAL LABOR RELATIONS BOARD

Monogram Models, Inc. and District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO	Case No. 13-CA-7839

DECISION AND ORDER

On November 30, 1967, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

The Trial Examiner found, and we agree, that the Respondent interfered with the distribution of union literature by nonemployee Union organizers on the public highway at the entrance to Respondent's plant, in violation of Section

8(a)(1) of the Act. In so finding, we rely on the admitted facts[1] that on various dates in January, February, and April, 1967, Respondent interfered with the Union's distribution of union literature to Respondent's employees at the intersection of Waukegan Road and Respondent's south entrance; that Respondent requested and secured the support of local police to force the removal of the Union agents who were distributing union literature at this entrance to Respondent's parking lot; that Respondent's President Jack Besser threatened the Union's organizers with arrest and prosecution for criminal trespass if they persisted in distributing Union literature at the entrance to that parking lot; and that Respondent's President Besser, while awaiting the arrival of local police, remained standing about 30 feet from the Union organizers in full view of employees entering and leaving the Respondent's plant.[2] The parties stipulated that at the above times, the Union organizers were standing at the point designated as the shoulder of Waukegan Road adjacent to the stop light located at the intersection of Waukegan Road and the entrance to Respondent's private property which was subject to an easement for purposes of a public highway.[3]

We find, however, that a preponderance of the evidence fails to support the Trial Examiner's finding that the Respondent committed a separate additional violation of Section 8(a)(1) of the Act by engaging in surveillance,

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[1] Although the Respondent admitted the facts set forth herein, it denied the commission of unfair labor practices.

[2] Contrary to the Trial Examiner, there is no link fence running along the Western Boundary of Respondent's property facing Waukegan Road.

[3] In these circumstances, we find it unnecessary to rule on the alternative finding of the Trial Examiner that the Respondent's conduct would have been unlawful even if the Union organizers had been distributing literature on the Respondent's private property not subject to a public easement for highway purposes. Cf. N.L.R.B. v. Babcock & Wilcox Co., 351 U. S. 105.

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and we shall grant the Respondent's motion to dismiss the complaint in this respect.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Monogram Models, Inc., Morton Grove, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete the words "solicitation of employees and the" from paragraph 1(a) of the Order.

2. Delete from the Order paragraph 1(b); renumber paragraph 1(c) as 1(b).

3. Delete the words "solicit or" from the first indented paragraph of the Notice.

4. Delete the entire second indented paragraph of the Notice.

It Is Further Ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D. C., March 21, 1968.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Sam Zagoria, Member
(Seal) National Labor Relations Board

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[1] Milco, Inc., 159 NLRB 812; Hunt Electronics Company, 146 NLRB 1328. The Respondent's Motion for Summary Judgment and to dismiss the complaint is in all other respects denied.

TRIAL EXAMINER'S DECISION

Statement of the Case

Paul E. Weil, Trial Examiner: On Charges filed April 17, 1967, the General Counsel issued his complaint on June 16, 1967, against Respondent herein alleging violations of Section 8(a)(1) of the Act by Respondent's interfering with and keeping under surveillance the distribution of handbills by union representatives in front of Respondent's plant. By its duly filed answer, Respondent admitted various facts with regard to jurisdiction, status of the Union as a labor organization, and an allegation that Respondent's president was its agent, but denied the commission of any unfair labor practice.[1] The matter came on for hearing before me on October 11, 1967. All parties were represented and had an opportunity to introduce evidence, examine and cross-examine witnesses, argue orally on the record, and file briefs. Oral argument was waived by the parties. Briefs received from the General Counsel and the Respondent have been duly considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact and Conclusions

I. The Business of Respondent

Respondent, an Illinois corporation, manufactures model hobby products and related items and annually sells its products, valued in excess of $50,000, in interstate commerce to places outside the State of Illinois. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization

District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

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[1] An amended answer, filed at the hearing, is discussed below.

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III. The Unfair Labor Practices

Respondent's plant is situated in the village of Morton Grove, Illinois, a suburb of Chicago, on Waukegan Road at the intersection of Caldwell Avenue. Respondent's site abuts Waukegan Road and Caldwell Avenue for a distance of approximately 480 feet. The western boundary of Respondent's property is the center line of Waukegan Road.[2]

The westerly 50 feet of Respondent's property is subject to a permanent easement for purposes of a public highway. At a point a few feet east of the paved roadway on the northern corner of Respondent's property and at a point about 10 feet from the paved roadway on the southern boundary of Respondent's property are entrance driveways. A chain-link fence runs along Respondent's western boundary, 40 feet east of the edge of the easement and 10 feet into it. On the inside of the chain-link fence along Waukegan Road is parking for employees and visitors.

On the north, south and east boundaries of Respondent's property are chain-link fences surmounted with three strands of barbed wire at a height of 7 feet. The property to the south and to the east of Respondent's is public forest preserve, a primitive recreation area overgrown with trees and brush. To the north of Respondent's property is a plant of the Illinois Bell Telephone Company. Between the plant building and the property line on the south of Respondent's property is additional employee parking, and the employee plant entrance is located on that side.

The northern roadway into Respondent's property is clearly marked "exit only"; the southern roadway is marked "Monogram entrance—Shipping and Receiving—Visitors please park in North lot." Attached to the fence on the sides abutting the forest preserves, i.e., the south and east borders of Respondent's property, are signs which state

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[2] A plat stipulated in evidence indicates that the southernmost third of the property line runs along the center line of Caldwell Avenue into which Waukegan Road joins at an angle of approximately 25 degrees.

"Warning keep out. Private property. Area patrolled, violators will be prosecuted."

Respondent, by an amended answer filed at the hearing, admitted the allegations of the complaint that on January 12, February 7, and April 12, Respondent interfered with the Union's distribution of union literature to Respondent's employees at the intersection of Waukegan Road and Respondent's south entrance; that on January 12 and April 12 Respondent requested and secured the support of local police to force the removal of the union agents who were distributing union literature from the entrance to Respondent's parking lot; that on February 3 Respondent President Jack Besser threatened the Union's organizers with arrest and prosecution for criminal trespass if they persisted in distributing union literature at the entrance to that parking lot; and that on April 12 Respondent, while awaiting the arrival of local police and in full view of the employees, kept under surveillance the union representatives who sought to distribute union literature to the employees entering and leaving the Respondent's property.

The General Counsel contends that by right of the easement for public highway purposes of the westernmost 50 feet of Respondent's property, the union agents had a right to distribute handbills at the entrance to Respondent's parking lot[3] and that Respondent, by its acts in ejecting the Union's agents and keeping them under surveillance, violated Section 8(a)(1) of the Act. In the alternative, General Counsel contends that in view of all the circumstances, even if the Union's agents did not enjoy a legal right to be where they were, under the rule established in Babcock & Wilcox Company, 351 U. S. 109, 38 LRRM 2001, there were no other reasonable channels by which the nonemployee union organizers could reach the employees, wherefore the Board should require Respondent to permit the Union's

[3] The parties stipulated that the union agents took their positions outside the plant gate at a point approximately 10 to 15 feet from the paved highway, which was clearly within the easement.

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organizers to distribute their material at the site where they attempted to do so.

The Respondent contends that the easement for highway purposes is confined strictly to the vehicular use of the highway and for no other purposes whatsoever except those that might be intended for an emergency nature to the utilization of that property for purposes of public highway. Respondent additionally contends that the Union had reasonable channels of communication available to it where it can utilize its nonemployee organizers to contact Respondent's employees at some point other than Respondent's private property, wherefore the Babcock & Wilcox rule is not applicable to the situation with which we are here faced.

Discussion and Conclusions

The general rule and the rule in Illinois[4] is that an owner of land abutting a highway or street with a present subsisting ownership of the street subject to an easement has full dominion and control over the land embodied in the easement and all the rights of an absolute owner of the soil subject only to the easement and servitude in favor of the public, and may use the land for his own purposes in any way not inconsistent with the public easement.[5] The right acquired by the public by such an easement is ordinarily a mere easement of passage over it with the powers and privileges incident thereto. But the adjoining landowner, i.e., the owner of the fee, has no greater rights with regard to the easement than has any other member of the public. Any person who is on the ground for a purpose other than that of using it as a highway is a trespasser against the owner.[6]

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[4] *Sears* v. *Chicago*, 247 Ill. 204, 93 N.E. 158; 25 Am. Jur., Highways, Sec. 135.

[5] *Tacoma Safety Deposit Co.* v. *Chicago*, 247 Ill. 92, 93 N.E. 153.

[6] 25 Am. Jur., Highways, Sec. 137.

In addition to the primary use of a highway for purposes of travel and transportation by the public and uses incidental thereto, highways may also lawfully be used for purposes other than travel and transportation which are conducive to the public convenience, tend to make them of greater utility and convenience to those who legally have a right to their use, and are not inconsistent and incompatible with the reasonably free passage over them of whoever has occasion to travel upon them.[7] An abutting owner, even though he owns the fee of the highway, cannot object to the use of it which is incident to its primary use unless it constitutes an additional servitude or otherwise causes him special injury.[8]

The use of highways as a place for the prosecution of a public business for gain is generally recognized as a special or extraordinary use which the controlling authority may prohibit or regulate as it deems proper.[9] But the power of the municipality to regulate or prohibit distribution on its streets of papers or articles is limited to such power given to it by its charter or by the ordinary police powers of the State. Such limitations can be justified only where they are necessary for the protection of the public health, morals, or safety, reasonable in their requirements and nondiscriminatory in their operation. And it has been declared that such regulation may not go to the extent of abridging the constitutional right of freedom of speech and of the press.[10]

The public easement is coextensive with the limits of the highway and extends to its whole surface, so a person is entitled to free and unobstructed passage over any and

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[7] 25 Am. Jur., Highways, Sec. 163, 167.

[8] 25 Am. Jur., Highways, Sec. 173.

[9] 25 Am. Jur., Highways, Sec. 191.

[10] *Lovell* v. *Griffin*, 303 U.S. 444; 127 ALR 962 et seq.; *City of Chicago* v. *Schultz*, 173 N. E. 276.

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every portion thereof not in use by other travelers.[11] It includes the sidewalk space as well as that space paved for vehicular traffic.[12]

The distribution of printed material is protected, both under Article 1 of the United States Constitution which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," etc., which has been held to secure this privilege to all persons by the 14th Amendment to the Constitution (*Lovell* v. *City of Griffin*, 303 U.S. 444). The constitution of Illinois is even more far-reaching than that of the Constitution of the United States in providing that every person may speak freely, write, or publish on all subjects[13] and accordingly the distribution of handbills on the public streets may not be prohibited by municipal ordinances.[14]

In Marshall Field & Company, 98 NLRB 88, the Board, applying the "department store rule" found that a ban on solicitation by Respondent in the private street running out of doors on the Respondent's premises was unlawful. The circuit court reversed the Board in its application of the so-called department store rule, but as to the portion of the Board Order referring to the private street, Holden Court, stated:

> This is primarily a working area used occasionally by employees and customers. However, it does partake of the nature of a city street, even though owned by the Company, and we think there is substantial evidence to sustain the findings of the Board with respect to Holden Court.

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[11] 25 Am. Jur., Highways, Sec. 166. *Smith* v. *McDowell*, 148 Ill. 51, 35 N. E. 141.

[12] *Horn* v. *The City of Chicago*, 403 Ill. 549, 87 N. E. 2nd 646; *Tacoma Safety Deposit Co.* v. *City of Chicago, supra.*

[13] *Village of South Highland* v. *Stein*, 373 Ill. 472, 26 N. E. 2nd 868.

[14] *Marsh* v. *Alabama*, 326 U.S. 501; *Schneider* v. *State*, 308 U.S. 147.

Accordingly, the circuit court revised the Board's Order and inserted a paragraph reading "1(a) prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time." In view of the circuit court's rejection of the department store rule, I view its action with regard to Holden Court as the application by that circuit of the general rule protecting the right of solicitation and distribution of printed material on what is essentially a public easement of street purposes, although privately owned.[15]

Applying the principles quoted above to the facts in the instant case, it is clear that the General Counsel must prevail. The Union's agents' attempt to distribute union handbills at the entrance to Respondent's plant, were clearly on that portion of Respondent's property which had been impressed with an easement for highway purposes. There is no evidence that the union agents engaged in any activities which were immoral of unlawful, or transgressed Respondent's right either as a portion of the public to the public highway or as an abutting property owner, or that the use of the portion of the public highway by the union agents interfered with the rights of the public in any respect.

The Board has held that it is a violation of Section 8(a)(1) to interfere with nonemployee union representatives in their solicitation or distribution of written material.[16] The interference in the instant case was stipulated by Respondent. I therefore find that Respondent is in violation of Section 8(a)(1) of the Act by the interference with the Union's representatives, by its resort to police to remove them from the public highway in front of Respondents' plant, and by its surveillance of the union representatives

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[15] *Marshall Field & Co.* v. *N.L.R.B.*, 200 F. 2d 375, VIII Court Decisions NLRB, 558, 565.

[16] Bomar Instrument Corporation, 124 NLRB 1; United Fireworks Mfg. Co., Inc., 118 NLRB 883; Fashion Fair, Inc., etc., 159 NLRB No. 121.

and the employees to whom the representatives were seeking to distribute union literature on the public highway.[17]

In view of my conclusions above I deem it unnecessary to explicate my opinion that the General Counsel's alternative theory, in the event that a contrary conclusion is reached on the theory discussed above, is well taken. Were I to reach it I would find that under the rule set forth in Babcock & Wilcox, supra, the Union has no reasonable access to Respondent's employees other than the attempt by the Union in handbilling at the gate.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with the distribution of leaflets and handbills by nonemployee union organizers on the public highway in front of Respondent's plant and by engaging in surveillance of the employees and union organizers while the union organizers were distributing or attempting to distribute handbills to said employees, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in the Act, thereby engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

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[17] Respondent's reliance on the provisions of the Illinois statutes, and especially on chapter 95½, section 124 of the Illinois Revised Statutes is misplaced. That section limits the use of private property "used by the public for purposes of vehicular travel *by permission of the owner and not as a matter of right.*" It has no application to a situation such as that involved here, where the real property in question is used by the public as a matter of right by the action of the easement with which the property is concededly impressed. [Emphasis added.]

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in unfair labor practices, my Recommended Order will provide that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, I make the following:

RECOMMENDED ORDER

Monogram Models, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with agents of District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, or of any other labor organization in the solicitation of employees and the distribution of printed matter to employees on that section of Respondent's property which has been impressed with an easement for public highway purposes by requiring said agents to remove therefrom and by threatening to call and calling for police to forceably move said agents from said public highway.

(b) Engaging in surveillance of its employees at a time when agents of the above-named Union or any other labor organization are soliciting or distributing printed material on the public highway before Respondent's plant.

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c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at its plant in Morton Grove, Illinois, copies of the attached notice marked "Appendix." Copies of said notice [18] on forms provided by the Regional Director for Region 13, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.[19]

Dated at Washington, D. C., November 30, 1967.

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[18] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[19] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not interfere with agents of District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, or of any other labor organization when they attempt to solicit or distribute written material at the entrance to our plant.

We Will Not engage in surveillance of our employees when union agents are soliciting or distributing written materials at the gates to our plant.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization.

Monogram Models, Inc.
Employer

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U.S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 828-7570.

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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

April 28, 1970

Philip D. Goodman, Esq.
Prudential Plaza
Chicago, Illinois 60601

RE: MONOGRAM MODELS, INC. v. NLRB
No. 1473, October Term, 1969

Dear Mr. Goodman:

The petition for a writ of certiorari in the above- entitled case was docketed in this Court on April 24, 1970, as No. 1473, October Term, 1969. A form is enclosed for notifying the Solicitor General that the case was docketed.

Also enclosed is a form for entry of appearance of counsel. Kindly have Mr. Cohen complete and return it to this office.

Please refer to Rule 23(1)(i), which requires that there be appended to the petition for certiorari all opinions delivered, including all opinions of courts or administrative agencies in the case, and Rule 23(1)(j), which requires that copies of a judgment or decree be similarly appended. Will you have printed as soon as possible and forward to this office, with certificate of service, 40 copies of the decision and order of the National Labor Relations Board?

Very truly yours,
John F. Davis, Clerk
By Jennie H. Lazowski
Assistant

jmh
Enclosures

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1473

MONOGRAM MODELS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet officially reported. The Board's decision and order (A. 3–18) [1] are reported at 170 NLRB No. 84.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1970 (Pet. 2). The petition for a writ of certiorari was filed on April 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A." refers to the appendix filed in the court below.

384-518—70

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company interfered with the distribution of union literature by non-employee organizers on the shoulder of the public highway at the entrance to the company's plant, in violation of Section 8(a)(1) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 2–3 of the petition.

STATEMENT

A. THE BOARD'S FINDING OF FACT

Petitioner Company is engaged in the manufacture of model hobby products. Its plant in Morton Grove, Illinois, is situated on a rectangular-shaped lot fronting to the west on State Highway No. 43, also known as Waukegan Road—a four-lane paved highway with a posted speed limit of 45 miles per hour. The Company's premises are fenced in on all sides except on the west (A. 4, 5[1] n. 4, 7; 36). The last 50 feet of the western portion of the Company's property has been impressed with "a permanent easement for purposes of a public highway" (A. 7; 35). It consists of a paved roadway, which constitutes one-half of Highway No. 43, next to an unimproved and irregular shoulder extending along the edge of the pavement. A number of concrete parking berms separate the dirt shoulder

from the Company's paved parking lot and plant building (A. 7; 23, 45–46). Since there are no sidewalks in front of the Company's premises, pedestrians traveling north and south on the east side of Highway No. 43 must use the dirt shoulder (A. 7; 23). There is an entrance and exit at the southwest corner of the property, and stoplights there control the traffic entering and leaving the plant and parking lot (A. 27–29, 36, 38, 49, 52).

During early 1967, District No. 8, International Association of Machinists and Aerospace Workers, AFL–CIO, attempted to organize the Company's employees. On various occasions, the Company interfered with the Union's distribution of organizational literature to the employees. The company admitted that it had requested and secured the support of local police to force the removal of non-employee Union agents who were distributing literature at "the intersection of Waukegan Road and the entrance to [its] parking lot"; that the Company's president had threatened the organizers "with arrest and prosecution for criminal trespass if they persisted in the distribution of union literature" at this intersection; and that the Company's president, "while awaiting the arrival of the local police and in full view of the employees, kept under surveillance the union representatives seeking to distribute union literature to employees entering and leaving [the] property" (A. 19–20). It was stipulated that the Union organizers, while attempting to engage in the above distribution, were standing on "the shoulder of Waukegan Road adjacent to the stop light located at the

northeast corner at the intersection of Waukegan Road and the entrance to [petitioner's] property (on the part of [petitioner's] private property subject to an easement for purposes of a public highway)" (A. 22).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board concluded that the Company had interfered with the distribution of union literature by nonemployee organizers on the shoulder of the public highway at the entrance to the plant, and had thereby violated Section 8(a)(1) of the Act (A. 4, 13–14). The Board ordered the Company to cease and desist from engaging in the unfair labor practice found and from interfering with employee protected activities in any like or related manner, and to post appropriate notices (A. 5, 14–16).[2]

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1a–4a). After full argument on the factual issue, the court stated (Pet. App. 4a): "the shoulder area here in dispute is legally indistinguishable from a sidewalk"; access "to such a public way is associated with First Amendent rights"; and the Company "could not, then, without

[2] The Board denied the Company's motion for clarification "as to the character of the property" where the distribution occurred and to reopen the record to take additional testimony for this purpose, stating (A. 17):

> The Board specifically designated [in its initial decision] the point at which the Union organizers were standing as the shoulder of Waukegan Road adjacent to the stop light located at the intersection of Waukegan Road and the entrance to [petitioner's] private property which was subject to an easement for purposes of a public highway.

committing a Section 8(a)(1) violation, threaten the non-employee organizers with criminal trespass prosecution, since their use of the property was lawful and protected [citations omitted]."

ARGUMENT

Petitioner acknowledges that the Board and the court below "properly concluded * * * that non-employee union organizers may, in the exercise of their First Amendment rights, use the highway shoulder for organizational purposes * * *" (Pet. 6). Petitioner's sole contention is that the organizers were in fact not standing "on the highway shoulder" (*ibid.*). This assertion goes only to the facts of the case. It is contrary to the stipulated evidence of record (*supra*, pp. 3–4), and was rejected by both the Board and the court below. The issue thus does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
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DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
FRANK H. ITKIN,
Attorney,
National Labor Relations Board.

MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970